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IN THE

Supreme Court of the United States

TERM, 1970

No.

J. D. WILHITE,

Petitioner

versus

CITY OF MONROE,

Respondent

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA BY CITY OF MONROE, LOUISIANA

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STATEMENT

The City of Monroe states as its position in this matter that it adopts as correct the decision of the Supreme Court of Louisiana complained of by Defendant, namely, *City of Monroe v. J. D. Wilhite*, 233 So. 2d 535 (1970).

Further, and at the outset, the City of Monroe desires to clarify and amplify certain portions of the Statement of the Case as contained in the Application of Defendant.

(1) The Defendant was charged by separate affidavits with the violation of two (2) separate and distinct ordinances of the City of Monroe, namely, Section 24-6 of the *City Code of Monroe*, commonly referred to as "DWI", which is quoted as follows:

"Sec. 24-6. Driving under influence of alcoholic beverage.

No person shall operate a vehicle while under the influence of any alcoholic liquor or beverage, or any other matter or substance of any other kind or description containing alcohol, irrespective of the alcoholic content thereof. When the physical or mental faculties of any vehicle operator have been affected sufficiently to make the driving or operation of a vehicle in any degree less safe, such operator shall be 'under the influence' within the meaning of this section. (Ord. No. 3047, art. III, rule 3, 11-24-53; Ord. No. 3136, Sec. 1, 5-8-56; Ord. No. 3273, 7-11-58)."

And, secondly, with the violation of Section 24-8 of the *City Code of Monroe*, commonly referred to as "Speeding", which is quoted as follows:

"Sec. 24-8. Speed limits.

No person shall operate a vehicle in excess of fifteen miles an hour past any school ground while any child is occupying such ground. In all other places a vehicle shall not exceed twenty-five miles an hour, except that it shall be unlawful to operate a vehicle in excess of the hereinafter specified speeds, along the streets named as follows:

* * * * *

(3) Thirty-five miles an hour:

* * * * *

(f) North Eighteenth Street, between Forsythe Avenue and Louisville Avenue.

* * * * * "

(2) The possible maximum penalty upon being convicted of the violation of any one (1) ordinance of the City of Monroe where no specific penalty is provided, is con-

tained in Section 1-8 of the *City Code of Monroe*, which says:

> "Sec. 1-8. General penalty — Continuing violations.
>
> It shall be unlawful for any person to violate or fail to comply with any provision of this Code and where no specific penalty is provided therefor, the violation of, or failure to comply with, any provision of this Code shall be punished by a fine not exceeding five hundred dollars or imprisonment for a term not exceeding six months or by both such fine and imprisonment within the discretion of the court, together with court costs and expenses. Each day any violation of, or failure to comply with, any provision of this Code continues shall constitute a separate offense. (Ord. No. 3836, Sec. 1, 9-24-68)"

(3) The two (2) separate and distinct charges pending against the Defendant, to wit: DWI and speeding, were consolidated for trial by consent of the Attorney for the Defendant and the Attorney for the City of Monroe in order to expedite the trial of these two matters in the shortest possible time. This procedural device is designed to conserve trial time and is found in Article 493 of the Louisiana Code of Criminal Procedure, which is quoted as follows:

> "Upon motion of defendant, or of all defendants if there are more than one, the court may order two or more indictments consolidated for trial if the offenses and the defendants, if there are more than one, could have been joined in a single indictment. The procedure thereafter shall be the same as if the prosecution were under a single indictment."

This appeal then does not result from one (1) violation and one (1) possible fine of $1,000.00 in fine, plus costs of courts, and/or one (1) year in jail, but rather

represents an attempt by the Defendant to combine two (2) separate and distinct violations, each of which theoretically could result in a fine of $500.00, plus costs of Court, and or six (6) months in jail, and have this Court review this Application for Writs under *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d. 491, as if the Trial Court's decision was the result possible from one charge and one conviction. In this instance, the Trial Court ruled on each charge separately at the cose of the evidence and assessed specific fines, court costs and default days to each finding of guilty. This Application for Writs, therefore, is actually two (2) separate Convictions, one from conviction of "DWI" and one from conviction of "Speeding", but the procedural consolidation for trial technically causes this matter to appear to be before this Court as one conviction.

ARGUMENT

The crux of Defendant-Appellee's logic in requesting this Court to extend its decision reached in *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491, to the instant appeal is that "one (1) act" on Defendant's part subjected him to a possible penalty which Defendant contends meets the "serious crime" category born of the majority view in *Duncan v. Louisiana, supra*. This is a false premise in that the Defendant, by his actions, violated two separate and distinct ordinances of the City of Monroe, each of which must be judged separately for purposes of ascertaining guilt or innocence. Thus, the fact that Defendant sped in violation of posted speed limits is not related legally to the fact that Defendant drove a car on the streets of the City of Monroe while intoxicated. As a practical matter, these two facts did coincide, but this does not make them one violation or "act" legally. So it is that one may drive while intoxicated, and run over and

kill a pedestrian. In that event, cannot this person be charged under the laws of any State with the crimes of driving while intoxicated **and** manslaughter? In this example, although the elements of both crimes for a brief moment are all present, this person has committed two separate crimes under our law and may be charged with both crimes. Therefore, in the instant appeal, except for the consolidation of the trial of these two separate charges for the convenience of all parties, the Defendant would have theoretically only faced a possible sentence of $500.00 fine plus costs or six months in default of payment of fine for each separate violation.

The usual fines for these two offenses are generally known by the local bar and public and, upon being judged guilty, the Defendant in the instant case received these "usual" fines, just as he would had he chosen to plead guilty. This is included in argument to illustrate that in reality the Defendant knew that, if found guilty, he would be fined $425.00 plus $10.00 Court costs and in default of payment of fine 85 days for DWI, and $10.00 plus costs and in default of payment of fine two days for speeding. As Defendant knew they would be if he was found guilty, these fines were imposed by the Court. Therefore, the total fine possible under the Section 1-8 of the City Code of the City of Monroe, *supra*, was not a real threat to Defendant on either charge at any stage of the proceedings.

Finally, the Defendant in this matter cannot bring himself within his interpretation of *Duncan v. Louisiana*, *supra*, by fictionally cumulating several misdemeanors.

The basic criteria determining whether a person tried for a crime in Loiusiana is, or is not, entitled to trial by jury is found in Article VII, Section 41 of the *Louisiana*

State Constitution of 1921, which provision is quoted in part as follows:

> "Section 41. The Legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no woman shall be drawn for jury service unless she shall have previously filed with the clerk of the District Court a written declaration of her desire to be subject to such service. All cases in which the punishment may not be at hard labor shall, until otherwise provided by law, be tried by the judge without a jury. Cases, in which the punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict."

Based on this provision of our Constitution, the Legislature has defined a misdemeanor in Article 933(4) of the *Louisiana Code of Criminal Procedure* as follows:

> "Except where the context clearly indicates otherwise, as used in this Code:
>
> * * * * *
>
> (4) 'Misdemeanor' means any offense other than a felony, and includes the violation of an ordinance providing a penal sanction."

Again following Article VII, Section 41 of the Constitution we find Article 779 of the *Louisiana Code of Criminal Procedure* saying:

> "A defendant charged with a misdemeanor in which the punishment **may** be a fine in excess of five hundred dollars, or imprisonment for more than six

> months shall be tried by a jury of five jurors, all of whom must concur to render a verdict; provided, however that a defendant charged with such an offense may waive a trial by jury and elect to be tried by the court."

The City of Monroe takes the position that under the cited Louisiana authority the Defendant does not have a right to a jury trial as the penal provision of the ordinances violated quite clearly must, at least, fall within the category of a misdemeanor. This Article was amended by Act No. 635 of 1968 by the Louisiana legislature following this Court's decision in the *Duncan* case. The City of Monroe therefore takes the position that under the cited Louisiana authority the Defendant does not have a right to a jury trial as the penal provision of the City of Monroe ordinances violated quite clearly must, at least, fall below the category of "serious crimes" as expressed by this Court in the *Duncan* decision.

The majority opinion in *Duncan v. Louisiana*, *supra*, is well known and understood by the Supreme Court of Louisiana as evidenced by its unanimous opinion in *State v. Beer*, 202 La. 756, 214 So. 2d 133 (1968). The City of Monroe understands this Court's holding in the *Duncan* case to be embodied in the following language from that opinion, to wit:

> "It is sufficient for our purposes to hold that a crime punishable by two years in prison is, based on past and contemporary standards in this country, a serious crime and not a petty offense." *88 S. Ct.* 1454.

Thus, this Court, after writing in terms of "serious" and "petty" crimes decided that two years falls under the "serious" category and that a person charged with a crime

calling for such a penalty is entitled under Articles VI and XIV of the *Constitution of the United States* to a jury trial, regardless of State law to the contrary, as a Constitutional guarantee.

The City of Monroe adopts, as its position, the dissenting opinion of Justices Harlan and Stewart in the *Duncan* case in its entirety, and quotes with particular approval the following:

> "This argument that jury trial is not a requisite of due process is quite simple. The central proposition of *Palko, supra*, a proposition to which I would adhere, is that 'due process of law' requires only that criminal trials be fundamentally fair.
>
> As stated above, apart from the theory that it was historically intended as a mere shorthand for the Bill of Rights, I do not see what else 'due process of law' can intelligibly be thought to mean. If due process of law requires only fundamental fairness, then the inquiry in each case must be whether a state trial process was a fair one. The Court has held, properly I think, that in an adversary process it is a requisite of fairness, for which there is no adequate substitute, that a criminal defendant be afforded a right to counsel and to cross-examine opposing witnesses. But it simply has not been demonstrated, nor, I think, can it be demonstrated, that trial by jury is the only fair means of resolving issues of fact." *88 S. Ct. 1468-1469.*

and

> "In sum, there is a wide range of views on the desirability of trial by jury, and on the ways to make it most effective when it is used; there is also considerable variation from State to State in local conditions such as the size of the criminal caseload, the ease or difficulty of summoning jurors, and other trial conditions bearing of fairness. We have before us; therefore, an almost perfect example of

> a situation in which the celebrated dictum of Mr. Justice Brandeis should be invoked. It is, he said, 'one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory * * *.' *New State Ice Co. v. Liebmann*, 285 U.S. 262, 280, 311, 52 S. Ct. 371, 386, 76 L. Ed. 747 (dissenting opinion).
>
> This Court, other courts, and the political process are available to correct any experiments in criminal procedure that prove fundamentally unfair to defendants. That is not what is being done today: instead, and quite without reason, the Court has chosen to impose upon every State one means of trying criminal cases; it is a good means, but it is not the only fair means, and it is not demonstrably better than the alternatives States might devise." *88 S. Ct. 1472.*

The City of Monroe further contends that under the holding of the *Duncan* case, cited hereinabove, any crime, other than federal, carrying a penalty of under two years may be classified as "petty" and that the majority opinion in Duncan only establishes that two years is considered "serious" enough for Amendments VI and XIV of the Federal Constitution to apply.

The maximum penalty involved in the instant cases is six months and therefore well under the "serious" crime standard of the *Duncan* case. This fact being true, there is no question but that the Constitution and laws of the State of Louisiana apply and neither the Defendant's rights under the Constitution of the State of Louisiana or the Constitution of the United States have been violated by virtue of the fact that he was tried by a Judge alone.

The Defendant has argued that this Court should take notice of the insurance consequences of a conviction of

driving while intoxicated. Neither this nor any other Court can, in its deliberations of the criminal law or procedure applicable to a specific criminal case, base its decision of guilt or innocence upon the possible social or economic factors involved, or the possible future inconvenience, embarrassment or expense to the Defendant.

The remainder of the Defendant's arguments express non-legal arguments which are not present in, or supported by, the record before this Court and which, therefore, cannot be considered in connection with this application.

CONCLUSION

In conclusion, the City of Monroe submits that this case was decided by the Supreme Court of Louisiana in a way entirely consistent and in complete accord with the applicable decisions of this Court.

Respectfully submitted,

CHARLES L. HAMAKER
Assistant City Attorney
Monroe, Louisiana
Attorney for Respondent.

CERTIFICATE

STATE OF LOUISIANA
PARISH OF OUACHITA

CHARLES L. HAMAKER, being duly sworn, deposed and said that he is an Assistant City Attorney for the City of Monroe in the above entitled and numbered action and that the Appellant-Petitioner was served with a true and correct copy of the petition for a writ of certiorari on or before the 8th day of October, 1970.

/s/ CHARLES L. HAMAKER
CHARLES L. HAMAKER

SWORN TO AND SUBSCRIBED before me this 8th day of October, 1970.

/s/ DAVID C. DARCEY
NOTARY PUBLIC